Supreme Court, U.S.
FILED
OCT 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-351

In the Supreme Court of the United States

OCTOBER TERM 1985

CHARLES H. GRUBB
Respondent,
v.
W. A. FOOTE MEMORIAL HOSPITAL, INC.,
Petitioner.

REPLY BRIEF OF PETITIONER

JOHN H. SCHOMER
DYKEMA, GOSSETT, SPENCER,
GOODNOW & TRIGG
One Jackson Square
Jackson, Michigan 49201
(517) 787-2550
Counsel for Petitioner

RENAISSANCE PRINTING, INC., 1133 GRISWOLD
4TH FLOOR, DETROIT, MICHIGAN 48226 (313) 964-3185

BEST AVAILABLE COPY

TABLE OF CONTENTS

PAGE

Table of Authorities ii

Introduction 1

Argument 2

The Judgment Below Must Be Reversed Since The District Court Unquestionably Selected One Of The Two Permissible Views Of The Evidence On The Basis Of Its Clearly Erroneous Factual Findings.

TABLE OF AUTHORITIES

PAGE

Anderson v. *City of Bessemer City*, 470 U.S.__, 105 S. Ct. 1504, 84 L.Ed.2d518 (1985) 4

Grubb v. *W.A. Foote Memorial Hospital, Inc.*, 759 F.2d 546 (6th Cir. 1985) 3

Grubb v. *W.A. Foote Memorial Hospital, Inc.*, 741 F.2d 1486 (6th Cir. 1984) 3

Grubb v. *W.A. Foote Memorial Hospital, Inc.*, 533 F. Supp. 171 (E.D. Mich. 1981)..... 3

Pullman-Standard v. *Swint*, 456 U.S. 273 (1982) .. 5

No. 85-351

In the Supreme Court of the United States

OCTOBER TERM 1985

CHARLES H. GRUBB

Respondent,

v.

W.A. FOOTE MEMORIAL HOSPITAL, INC.

Petitioner.

REPLY BRIEF OF PETITIONER

INTRODUCTION

The most telling aspect of the Brief for Respondent in Opposition to Petition for Writ of Certiorari is that not once has the Respondent disputed the existence of the material factual error upon which the district court premised its finding of racial animus and upon which the Petition is based.* Rather, the Respondent has transparently attempted to obfuscate the relevant issues at hand by selectively summarizing and edi-

* The Respondent has, however, done the Petitioner a disturbing disservice by citing out of context a portion of the Petition, when he argued that the Petitioner has conceded that the Petition is based upon "reasonable surmise." At page 15 of the Petition, the Petitioner only stated that "One can reasonably surmise that these clearly erroneous findings also tainted the trial court's perception and treatment of other evidence introduced at trial." The errors discussed in the Petition are certainly not the by-product of surmise. They are amply disclosed by an objective review of the record.

torializing *other* portions of the trial record that, when viewed in isolation, arguably might have supported a finding of race discrimination.

Yet, there is absolutely no reason for either the Petitioner or this Court to address the issue of whether one permissible view of the evidence would have permitted a finding of discrimination. Indeed, as will be discussed more fully below, the Court may assume arguendo that one permissible view of the evidence would have allowed a finding of discrimination.

The issue before the Court is whether the trial court's selection of one permissible view, to the exclusion of another, based upon undisputably erroneous factual findings, compels a reversal of the judgment below. Under the circumstances of this case, that question can be answered only in the affirmative.

ARGUMENT

The Judgment Below Must Be Reversed Since The District Court Unquestionably Selected One Of The Two Permissible Views Of The Evidence On The Basis Of Its Clearly Erroneous Factual Findings

The Respondent has made no effort, whatsoever, to dispute the existence of the material factual error upon which the district court unquestionably premised its finding of racial animus and which has been discussed at length in Foote Memorial's Petition for Writ of Certiorari. The erroneous finding, as well as the context in which it was applied by the district court, can be summarized as follows:

1. The district court found as an "undisputed" fact tha the Respondent's supervisor, Willard Carl, directed the Respondent's subordinate, Rosella Fountain, to report

directly to him rather than to the Respondent. 533 F. Supp. 671, 674 (E.D. Mich. 1981), App. A-4. This factual finding was not only unsupported but entirely contradicted by the trial record.

2. On the sole basis of the court's mistaken belief that there existed some evidence to the effect that Mr. Carl had actually directed Mrs. Fountain to report directly to him rather than to the Respondent and that such evidence had gone entirely undisputed, the court credited the Respondent's testimony that "Mr. Carl's expressed reason for this alteration in line of authority was explained to plaintiff in the following words: 'a black man has no place supervising white women.' " *Id.*

3. The district court found, in turn, that the Respondent's credited testimony concerning the remark at issue, together with another alleged slur, "establishes that the basis for the animus was Mr. Grubb's race and/or age." *Id.*

The error prompted the majority in *Grubb I*, which included Judge Wellford, to find that "it appears that the District Court based its decision, to credit Grubbs' testimony that Carl directed Mrs. Fountain to report to him because '[a] black man has no place supervising white women,' on an erroneous finding." 741 F.2d 1486, 1497 (6th Cir. 1984), App. E-21, 22.

Significantly, the majority in *Grubb II* which also included Judge Wellford, did not purport to challenge the cited finding of clear error. Nor did it question the materiality of the error. *See generally*, 759 F.2d 546 (6th Cir. 1985), App. H. The majority in *Grubb II* opted instead to ignore and disregard the material error, while holding that "[i]n view of the completeness of the statement of facts, which is already published, the majority of the court believes that they are sufficient to support. . ." the finding of racial discrimination. 759 F.2d 547, App. H-2.

In *Anderson* v. *City of Bessemer City*, 470 U.S.____, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), this Court held that "[w]here there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." 105 S.Ct. at 1512. The majority in *Grubb II* has taken this holding one step further and held that where there are two permissible views of the evidence, the fact finder's choice cannot be clearly erroneous, *even if the fact finder's choice is based upon clearly erroneous findings.*

Such a ruling would have been proper only had the majority in *Grubb II* concluded that the trial record permitted only one view of the controlling factual issue, with that view being that the Respondent was discriminated against due to his race.

This case, however, did not involve just one permissible view of the evidence. Both members of the majority in *Grubb II* have acknowledged that there are two permissible views of the evidence: one permissible view being that Willard Carl was motivated by racial animus and the other equally permissible view being that Mr. Carl's decision to eliminate the Respondent's position was not motivated by racial animus. In his dissent to the majority opinion in *Grubb I*, Judge Engel found that:

> The motives behind the Hospital's action in discharging Charles W. Grubb were probably mixed, and it is possible to draw a number of differing and even conflicting inferences from the proof. The discharge may have been prompted by a business necessity, by animus against Grubb because of his personality, or by a deep seated resentment against him because of his advanced age or race. As the facts recited in the majority opinion make clear, there was evidence from which any of the foregoing conclusions could have been reached by the trial judge. . .

741 F.2d 1502, App. E-32.

Similarly, in his *Grubb II* concurrence, Judge Wellford remarked:

> I concur with the decision of Judge Engel, upon reconsideration, despite serious misgivings about the facts in this case. While I probably would have reached a different result with respect to the findings and conclusions made by the trial judge, it is she who had the responsibility to make the credibility determination after an opportunity to assess the proof and evidence.

759 F.2d 547, App. H-2.

Whether the trial court *would have*, as opposed to *could have*, arrived at the same conclusion, absent its misperception of the evidence, is unknown. What is known is that the trial court chose between the two permissible views of the evidence for clearly erroneous reasons.

Given its opinion that the district court would have been entirely justified in finding that no discrimination took place, the majority in *Grubb II* had no basis or authority to fill the factual void created by the district court's error. At the very least, the court of appeals was obligated to remand this matter to the district court for further proceedings as to the issue of racial animus. As this Court held in *Pullman-Standard* v. *Swint*, 456 U.S. 273(1982):

> When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings:
>
> > '[F]actfinding is the basic responsibility of the district courts, rather than appellate courts, and. . . the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court.' *DeMarco* v. *United*

States, 415 U.S. 449, 450. . .(1974).

Likewise, where findings are infirm because of an erroneous view of the law, a remand is the proper course *unless the record permits only one resolution of the factual issue*. *Kelly* v. *Southern Pacific Co.*, 419 U.S. 318, 331-332 (1974). All of this is elementary.

456 U.S. 291-292. (Emphasis supplied)

The irony of *Grubb II* is that, in applying the standards of appellate review set forth in *Anderson* v. *City of Bessemer City* and purporting to disavow any authority to substitute its judgment for that of the district court with respect to which of the two permissible views of the evidence should prevail, the majority did, in effect, substitute its judgment for that of the district court. The district court alone has the authority to determine anew whether in the absence of erroneous factual findings, Willard Carl's actions were prompted by discriminatory animus.

The issues raised by the petition are not, as the Respondent would have this Court believe, primarily factual rather than legal. The Petitioner is not requesting that the Court choose betweeen one of two or more permissible views of the evidence. The Petitioner seeks only to have the Court review and reverse the *Grubb II* majority's decision to do so.

Where a trial court specifies the particular factual findings upon which its finding of racial animus is premised and those findings prove to be entirely erroneous, the finding of racial animus cannot and should not be affirmed simply because other evidence might have arguably supported such a conclusion. To the extent that the majority in *Grubb II* has viewed and applied the standard of appellate review differently, it has committed clear legal error. At the same time, the published opinion in *Grubb II* creates dangerous precedent, especially when read together with the published opinion in *Grubb I* by the same panel of judges.

The opinion in *Crubb II* provides this Court with a perfect vehicle, as well as a compelling reason, to clarify further both the proper and necessary scope of appellate review under the clearly erroneous standard, in the wake of *Anderson* v. *City of Bessemer City*.

Respectfully submitted,

DYKEMA, GOSSETT, SPENCER,
GOODNOW & TRIGG
John H. Schomer (P20051)
Attorneys for Petitioner
One Jackson Square
Jackson, Michigan 49201
(517) 787-2550

Dated: October 15, 1985